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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 502

UNITED STATES OF AMERICA, *Appellant*,
(Defendant below),

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION, *Appellees*,
(Plaintiffs below).

No. 503

INTERSTATE COMMERCE COMMISSION, *Appellant*,
(Defendant below),

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION, *Appellees*,
(Plaintiffs below).

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION OF APPELLEE, MILWAUKEE ROAD COMMUTERS' ASSOCIATION TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT.

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STATEMENT OF THE CASE.

These are appeals by the United States and by the Interstate Commerce Commission from a decree of a three-

judge District Court declaring invalid and setting aside orders of the Interstate Commerce Commission increasing Chicago suburban passenger fares of Chicago, Milwaukee, St. Paul & Pacific Railroad Company (herein called the "Milwaukee Road").

The proceeding before the Interstate Commerce Commission was under Section 13(4) of the Interstate Commerce Act.

All fares involved were intrastate fares, except for fares to two stations in Wisconsin, at the end of one of the suburban lines involved. The orders of the Interstate Commerce Commission which were set aside by the District Court, increased the interstate fares to the two Wisconsin stations to conform to similar increases in the intervening intrastate fares, and the decree invalidating the increase in intrastate fares also invalidated the corollary increase in interstate suburban fares to the two Wisconsin stations.

An earlier appeal by the Milwaukee Road from the same decree of the three-judge District Court is pending in this Court as Case No. 307 of the October, 1956 Term, entitled, "*Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* v. *State of Illinois, Illinois Commerce Commission and Milwaukee Road Commuters' Association.*

The Milwaukee Road filed a jurisdictional statement in connection with the earlier appeal (Case No. 307), and appellees State of Illinois and Milwaukee Road Commuters' Association filed separate motions to affirm.

QUESTIONS AT ISSUE

For a statement of the issues and argument on the points involved, we refer to and incorporate herein the Motion to Affirm filed by Milwaukee Road Commuters' Association in Case No. 307.

Our statement and argument on the present Motion to Affirm will be confined to such additional comment as seems called for by the Jurisdictional Statements of the United States and the Interstate Commerce Commission in the instant appeal.

The grounds upon which the decree of the District Court held invalid the order of the Commerce Commission are:

1. The order of the Commission bases the allowance of an increase in suburban fares on the ground (among others) that the additional revenue that would accrue to the Milwaukee Road from the increased fares would result in "a fair contribution" by the suburban service to the indirect costs of the Milwaukee Road.

The District Court held that there are no findings to support that conclusion.

2. The order of the Commission finds that the fares prescribed therein are "just and reasonable."

The District Court found that there is no evidence to support that finding.

3. The jurisdiction of the Interstate Commerce Commission over the intrastate suburban fares involved rests on the proposition that the action of the Illinois Commerce Commission, in fixing the fares attacked was unjustly and unreasonably discriminatory against interstate commerce.

The fares in question were fixed by the Illinois Commerce Commission, by an order entered just a few months before the proceeding before the Interstate Commerce Commission was instituted. As stated in the Interstate Commission's order, the Illinois Commission's order was fair and reasonable on the evidence presented and upon the theory relied upon and asserted by the Milwaukee Road before the Illinois Commerce Commission. The fact that the Milwaukee Road elected to institute a new proceeding before the Interstate Commission upon a different theory, supported by different evidence, does not deprive the Illinois Commission of its primary jurisdiction over the intrastate rates involved.

The District Court held that there was no showing that the Illinois Commission's action was unjustly or unreasonably discriminatory against interstate commerce.

As set forth in our Motion to Affirm, in Case No. 307, the decision of the District Court upon each of the issues stated, was based upon facts and evidence, and well-established principles of law applicable thereto. There is no substantial question of fact or law involved requiring review by this Court.

The Jurisdictional Statements of the United States and of the Interstate Commerce Commission, filed in the instant appeal, raise no new issues.

The Jurisdictional Statement of the Interstate Commerce Commission follows in general the Jurisdictional Statement of the Milwaukee Road in the earlier appeal (Case No. 307).

The United States confines its Jurisdictional Statement to the question of the jurisdiction of the Illinois Com-

merce Commission over intrastate rates and makes no objections to the decree appealed from insofar as that decree, or the 'opinion' upon which it is based, holds that the findings and evidence are insufficient to sustain the order.

The only questions raised by the Jurisdictional Statements of the United States and the Interstate Commerce Commission that require additional comments here, are:

1. 'The effect of the District Court's decree as it relates to the primary jurisdiction of the Illinois Commerce Commission; and

2. Whether the decree of the District Court was in error insofar as it invalidated that part of the order of the Interstate Commerce Commission that fixed interstate rates to the two suburban Wisconsin stations.

ARGUMENT.

I.

The Effect of the Decree of the District Court, Insofar as It Relates to the Jurisdiction of the Interstate Commerce Commission.

The argument on this point in the Jurisdictional Statements rests on the erroneous assertion that the decree appealed from, or the opinion on which it rests, holds that no evidence could ever be introduced before the Interstate Commerce Commission in a proceeding under Section 13(4) of the Interstate Commerce Act, if that evidence had not been previously introduced before a state regulatory agency.

There is no basis for that assertion. An examination of the District Court's opinion will show that it has no foundation, in fact, or by reasonable inference from what the District Court said.

The pertinent part of the opinion is as follows:

> "In the state commission proceeding, which was initiated by the Milwaukee Road, the latter showed in its exhibits that the depreciation of locomotives and coaches was not included in the out-of-pocket cost. Likewise, in its exhibits in that case it did not include in out of pocket expense certain maintenance of way accounts involving maintenance of facilities, such as roadbed, etc. The comments in the interstate commission's report, in regard to these items, show that they were by the Milwaukee Road deliberately removed from the consideration of the state commission. It follows that facts presented by Milwaukee Road to and relied upon by the interstate commission to support its finding as to an out-of-pocket sub-

urban deficit, were not presented to nor relied on by the Milwaukee Road in the state commission proceeding. If different evidence is to be offered or a different basis of fares is to be urged before the interstate commission, the state commission should have been given a chance to fix fares on the same evidence and the same basis.

In *North Carolina* v. *United States*, 325 U. S. 507, at 511, the court said:

'Since the enactment of § 13 (4), as before its enactment, a state's power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. When this point — not always easy to mark — is reached, and not until then, can the Interstate Commerce Commission nullify a state-prescribed rate.'

Where a railroad seeks the fixing of higher interstate rates by the interstate commission after failing in such endeavor before a state commission, § 13 (4) does not contemplate that the state commission is to be considered only a way-station in a journey to the interstate commission. In the instant case justification for the exercise of the federal power to nullify state rates does not clearly appear from the record before us.''

It is clear that the District Court did not rest its decision with respect to the primary jurisdiction of the State Commission over intrastate rates, on any supposed technical rule of evidence. The Illinois Commerce Commission had not, in any sense, acted unfairly or unjustly in fixing the rates complained of. It did not forfeit its primary jurisdiction over intrastate fares and its order could not be nullified as unfair, inequitable or discriminatory.

The repeated statements in the opinions of this Court, that the State Commission has primary jurisdiction over intrastate rates would have no meaning if the rule were otherwise.

II.

The Application of the Decree to Interstate Fares Between Chicago and Suburban Stations in Wisconsin.

The two stations involved are Walworth and Zenda, Wisconsin, which are at the end of the west suburban line of the Milwaukee Road, and are served by one suburban train a day in each direction. The orders of the Interstate Commerce Commission in suit, after approving an increase in the intrastate fares, provided for a corresponding increase in the interstate fares to the two stations at the end of the line.

If the orders were improper as to intrastate rates, they were necessarily improper as to interstate rates which depend on the intrastate rates and the District Court was right in not differentiating between them.

The District Court had equitable jurisdiction over the orders of the Interstate Commerce Commission insofar as they affected interstate as well as intrastate rates.

The District Court clearly acted correctly in remanding to the Interstate Commerce Commission the question of whether there was an independent basis for raising the fares to these two Wisconsin stations.

There is no substantive question of fact or law in this case that requires further argument or review in this Court.

We submit that the Motion to Affirm the Judgment of the District Court should be granted.

Respectfully submitted,

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